IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 382 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SUNILBHAI PRANBHAI KHARA

Versus

RUKSHMANIBEN GIRDHARLAL MEHTA

Appearance:

1. Civil Revision Application No. 382 of 2002

MR JD AJMERA for Petitioner.

NOTICE SERVED BY DS for Respondent No. 1

MR PC KAVINA for Respondent No. 2-3

CORAM : MR.JUSTICE K.A.PUJ

Date of decision: 8/10/2002

CAV JUDGEMENT

Rule. The present Civil Revision Application is filed against the order dated 25.2.2002 passed by the learned Civil Judge (JD), Rajkot, in application below Exh. 98 in Special Civil Suit No. 202 of 1998, whereby the learned Judge has rejected the application Exh. 98

filed by the present petitioner, original-defendant in the suit praying for a relief to frame the preliminary issue in regard to the jurisdiction of the Civil Court to try the Civil Suit filed by the present respondents who are original-plaintiffs in the suit.

2. The brief facts, giving rise to the present petition, are that the respondents-plaintiffs have filed Special Civil Suit No. 202 of 1998 in the Court of learned Civil Judge (SD), Rajkot, for a declaration that out of plaintiffs' plot No. 34 admeasuring 361-3-0 sq.yards of land, the encroached land of the plaintiffs be ordered to be given vacant and peaceful possession and decree may be passed accordingly and it may further be declared that the petitioner original-defendant has no right to put up any construction on plot No. 34. The respondents-plaintiffs have also filed an application for temporary injunction. Initially, the trial court had granted status-quo order, however, the said status-quo order has been vacated after hearing the parties and against that order the respondents had filed an Appeal From Order No. 658 of 1999 before this Court which was rejected and the order of the trial court was confirmed in favour of the petitioner.

3. The case of the petitioner is that he is a member in Prakash Cooperative Housing Society which is registered under the Gujarat Cooperative Societies Act, 1962. The petitioner and the respondents are the members of the said society. It is the say of the respondents in the suit that they purchased plot No.34 admeasuring 361-3-0 sq.yards of the land in the said society from the deceased Girdharlal Laxmichand Mehta. The petitioner has purchased the plot No.35 and the petitioner has constructed his residential premises and has been residing in the said premises.

4. It is the say of the petitioner that the petitioner and the respondents are the members of the Cooperative Society and there is inter-se dispute between the members of the society. The petitioner therefore had amended the written statement filed in the Special Civil Suit No. 202/98 under Order 6 Rule 17 of the Civil Procedure Code by adding Para 11-A to the effect that Prakash Cooperative Housing Society is a registered cooperative society and parties to the suit are the members of the said society and therefore the Civil Court has no jurisdiction to try and hear the said suit as the same falls within the ambit of Section 96 of the Gujarat Cooperative Societies Act, 1962 [hereinafter referred to as "the Act"]. The Board of Nominees has therefore the exclusive jurisdiction to decide the issue in question.

This amendment was granted by the trial court with the consent of the other side. The trial court also raised the issue regarding jurisdiction of the court to decide the issue in question.

5. The petitioner, thereafter, gave an application on 19.2.2000 to the trial court that the issue raised about the jurisdiction may be heard as a preliminary issue as it goes to the root of the matter and the suit is not maintainable before the Civil Court in view of Section 166 of the Act and the jurisdiction of the Civil Court is excluded. The respondents did not file any objection to the written application. At the time of the hearing of the said application, on behalf of the petitioner, it was contended that in view of Sec. 166 of the Act, the jurisdiction of the Civil Court has been excluded and under Section 96 of the said Act, only Board of Nominees has got jurisdiction to decide such dispute. On behalf of the petitioner, the reliance was placed on the decisions of this Court in the case of Dalpatbhai Bhimjibhai Mehta v. Ajitbhai Vadilal Shah = 1987 (2) GLH (U.J.) 8 and Jasuben Madhusudan Pandya v. Manharlal Narandas Bhatt = 1990 (1) GLH 199. On the other hand, on behalf of the respondents, it has been contended that the dispute between the parties was with regard to the encroachment of land by the petitioner and that there was no legal issue involved in the said suit. The court therefore has to decide the suit itself instead of deciding the preliminary issues as prayed for by the defendant. It has been further contended that the chief examination of the respondents was completed and at that stage the application to hear the preliminary issue regarding jurisdiction was not tenable and all issues are required to be decided finally. After hearing the parties, the trial court has come to the conclusion that the dispute between the parties to the suit, whether it falls within the ambit of Section 96(1) of the Act or not is a mixed question of law and facts and since such a dispute being a complicated question will have to be decided after taking evidence the application moved by the petitioner for framing the preliminary issue in regard to the jurisdiction of the court does not deserve to be allowed and accordingly the said application was rejected.

6. At the time of hearing of this Civil Revision Application, it is agreed by and between the parties that the matter may be finally decided by this Court though it may be only at the admission stage. Mr. JD Ajmera, the learned advocate appearing for the applicant-revisionist submitted that the ld. trial Judge has committed a grave

jurisdictional error in not entertaining the application moved by the petitioner to frame the preliminary issue with regard to the jurisdiction of the court. The question regarding jurisdiction goes to the root of the matter and unless and until that issue is decided the court cannot proceed further in the matter. Mr. Ajmera has further submitted that since the petitioner and the respondents are the members of the cooperative society, the Civil Court has no jurisdiction to entertain, try or decide any dispute which falls within the ambit of Section 96(1) of the Act which arose between the members of the society. Mr. Ajmera has further submitted that only the Board of Nominees is having the jurisdiction to decide such disputes arising between the members of the cooperative societies. In support of his submission, Mr. Ajmera has relied on the decision of this Court in the case of Dalpatbhai Bhimjibhai Mehta v. Ajitbhai Vadilal Shah (Supra). Mr. Ajmera has further submitted that there is a specific bar in Section 166 of the Act which excludes the jurisdiction of Civil Court in deciding any dispute arising between the members inter-se or disputes between the members of the cooperative society. Mr. Ajmera has further relied on the decision of this Court in the case of Anjaliben Nikhilchandra Mehta & Anr. v. Prabhakar Bapurao Fansalkar & Ors., = 40(2) GLR Page 1198, wherein it has been held that in the present case, it is a controversy raised by a member against the society seeking to enforce his rights arising under an agreement entered into with the society. Such a member cannot be told that because some others are inducted into that property, the forum under the cooperative law is not available to him. The dispute is essentially concerning the business and management of the affairs of the society and it is precisely to deal with such type of situations that a specific provision has been made under Sec. 99(3)(a) of the Cooperative Societies Act. Mr. Ajmera has further drawn my attention to the provisions contained in Order 14 Rule 2 of the Civil Procedure Code. This Rule consists of two parts. The first part is contained in Rule 1 which says that notwithstanding that a case may be disposed of on the preliminary issue, the court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. Sub-rule (2) deals with a case where issues both on law and on facts arise from the same suit and the court is of the opinion that a case or any part thereof can be disposed of and issue of law only in a case answering the precondition the court is authorised to try that issue first if it relates to (a) the jurisdiction of the court or (b) a bar to the suit created by any law for the first time in force. Therefore, sub-rule (2) of Rule 2 puts a further

restriction on the court that an issue of law though it might be disposing of the suit or any part thereof the same shall not be tried as a preliminary issue unless it involves the jurisdiction of the court or bar to the maintainability of the suit created by any law in force. Mr. Ajmera therefore submitted that the discretion given to the court under sub-rule (2) is circumscribed by a limited contingency that the issue tried must be relating to the jurisdiction of the court or bar to the suit created by law in force. Here, in the present case he submits that the dispute involved is between the members of the society and it falls within the ambit of Section 96(1) of the Act and therefore the civil court has no jurisdiction to try, entertain and decide the suit. The trial Court has, therefore, committed a jurisdictional error in not hearing the issues framed as preliminary issue with regard to the jurisdiction of the court and in this view of the matter the order passed by the trial court is required to be quashed and set aside.

7. On the other hand, Mr. Percy Kavina, learned advocate appearing for the respondents has submitted that the application Exh. 98 preferred by the present petitioner is only with regard to the hearing of the issue of jurisdiction of the Civil Court as a preliminary issue. Even in the present Civil Revision Application, the only prayer made by the petitioner is to the effect that the trial court may be directed to hear the issue regarding jurisdiction as a preliminary issue in accordance with law. The trial court has only come to the conclusion that the dispute between the present parties whether falls under Section 96(1) of the Act or not is a mixed question of law and facts because it has to be a dispute touching the constitution, management or business of a society and such a complicated question would have to be decided after taking evidence of the parties and their witnesses and on that count the trial court has come to the conclusion that it is not required to be heard the said issue as a preliminary issue. Even if the application Exh. 98 would have been granted, the trial court would have to decide the said issue as a preliminary issue and even if the present Civil Revision Application is allowed either varying or reversing the decision taken by the trial court, this Court can give direction to the trial court only to hear the issue regarding jurisdiction as a preliminary issue but in either of these cases the suit which is pending before the trial court would not be disposed of and in view of the amendment made in Section 115 of the C.P.C. the present Civil Revision Application filed by the petitioner is not maintainable.

8. Even on merits, Mr. Kavina has submitted that the judgment of this court in the case of Bhimjibhai Mehta v. Ajitbhai Vadilal Shah (Supra) relied on by the petitioner does not render any assistance to the petitioner as in that case the Municipal Corporation at one stage was said to have informed the opponent No.1 that wire fencing could not be demolished. Later on it appears to have changed its mind and have given notice to the applicant in that case under Sec. 260 of the Bombay Provincial Municipal Corporations Act to demolish the said wire fencing. The applicant therefore filed the suit against the Municipal Corporation for a declaration that the impugned notice was illegal, void and inoperative in law and the consequential relief that the respondent Corporation, its officers, servants and agents be restrained from demolishing the wire fencing. The opponent No.1 therefore filed an application Exhibit 16 before the trial court stating that he has a vital interest in the result of the suit and that he is likely to be affected by the decision and hence he should be impleaded as party-defendant in the suit. The learned Judge has held that the third party-applicant, present Opponent No.1, is a necessary and/or proper party and hence he was entitled to be joined as party-defendant and ordered that he be impleaded as defendant No.2 in the suit. The said order was challenged before this Court and in that context, this Court has taken the view that so far as the relief claimed in the suit was concerned , it is exclusively within the jurisdiction of the civil court, whereas the relief which the present opponent No.1 could have claimed against the applicant would be under the Gujarat Cooperative Societies Act, 1961 and therefore exclusively within the jurisdiction of the Court of the Nominee of the Registrar. This Court has further held that the jurisdiction of the Civil Court was totally barred in respect of any disputes between the society and its members or between members inter-se and that such dispute can be raised under Section 96 of the Act before Nominees' Court. Mr. Kavina has further submitted that the observations made by this Court in the said decision are obiter in nature and there was no occasion for this Court to have ruled on the fact situation in order to interpret the law and hence it is not a binding precedent. For this proposition, he has relied on the decision of the Hon'ble Supreme Court in the case of National Insurance Co. Ltd. v/s. Santro Devi and others = AIR 1998 SC 1485, wherein it has been held as under :

"We do not approve of the High Court having gone on the endeavour streamlining the law when its ratio on the fact situation was likely to be rendered totally obiter. As has been said above, there was a concurrent finding recorded by the Tribunal as well by the High Court that the offending vehicle was driven by a driver who had held a valid licence and it stood renewed on the date of the accident. There was thus no occasion for the High Court to have ruled on suppositions to the contrary in order to interpret the law and that too on a fact situation not available to it. Thus, we are constrained to intervene and hold that the entire exercise of the High Court in that direction was obiter, not at all a binding precedent. In that sense, we strike off from the impugned order observations and findings pertaining thereto. Yet at the same time, we are required and do hereby affirm the substantive part of the order, in holding that the claimants/respondents had rightly been granted compensation on account of the motor accident, on the basis of the recorded finding of fact. We cannot help remarking that the High Court instead could have well spent its time on other priorities."

Mr. Kavina has further submitted that the learned trial Judge has rightly come to the conclusion that it is a mixed question of law and facts and evidence is required to be taken for deciding the issue regarding jurisdiction. In support of his contention, he placed reliance on the Division Bench judgment of this Court in the case of The Choryasi Taluka Dudh Vechan Karnari Sahakari Mandali Ltd. v. The Surat Dist.Co.Op. Milk Producers' Union and Ors. = (1972) 13 GLR Page 797, wherein this Court has taken the view that the dispute whether it falls under Sec. 96(1) of the Gujarat Cooperative Societies Act or not is a mixed question of law and facts because it has to be a dispute touching the constitution, management or business of the society. Such a complicated question would have at times to be decided after taking evidence. Mr. Kavina has also relied on the decision of this Court in the case of Govindlal Jivanlal Desai v. Girishchandra Vadilal Vani = 1982 G.L.H. (U.J.) 8, wherein this Court has held as under:

"Under S. 96 of the Gujarat Cooperative Societies Act, 1961, in order to be within the

exclusive jurisdiction of the Board of Nominees constituted under the said Act, the dispute must be touching the constitution, management or business of a Society. The further requirement is that the parties to such a dispute touching the constitution, management or business of the society, must be from amongst the various categories specified in clauses (a) to (e) of S. 96(1) of the Act. When the first pre-requisite is missing, the second situation does not arise. The dispute in question between the parties is firstly, not between them in their capacity as the members of the society. Secondly, the dispute does not concern the society at all. It does not deal with constitution, management or business of the society if the old member pays money of share certificates to the new member or not. The society is not in any concerned with it."

9. Mr. Kavina has further submitted that the dispute involved in the suit does not in any way touch the constitution, management or business of the society and hence it does not fall within the purview of section 96(1) of the Act. In the suit, the dispute involved is to the effect that the present respondents have come with a case that four boundaries would be maintained keeping in mind the measurement of plot No. 34 and width of 8.35 metres of the western internal way. However,the plotholder of land bearing Plot No. 35 has not followed up the said referred instruction and encroached upon the land admeasuring about 14.5 mtrs. and therefore the present respondents have made a specific allegation of encroachment made by the present petitioner in the said land.

10. Such a dispute cannot be said to have touched the business, management or constitution of the Society and it does not fall within the ambit of Section 96(1) of the Act. In support of his contention, Mr. Kavina has relied on the decision of the Hon'ble Supreme Court in Deccan Merchants Cooperative Bank Ltd. vs. M/s. Dalichand Jugraj Jain and others = AIR 1969 S.C. 1320, wherein it was held as under:

"Although the nature of business which a society does can be ascertained from the objects of the society, it cannot be said that whatever the society does or is necessarily required to do for

> the purpose of carrying out its objects is part of its business. The word "touching" is very wide and would include any matter which relates to or concerns the business of a society, but it is doubtful whether the word "affects" should also be used in defining the scope of the word "touching". The question whether a dispute touching the assets of a society would be a dispute touching the business of the Society would depend on the nature of the society and the rules and byelaws governing it. Ordinarily, if a society owns buildings and lets out parts of buildings which it does not require for its own purpose it cannot be said that letting out of those parts is a part of the business of the society. But it may be that it is the business of a society to construct and buy houses and let them out to its members. In that case letting out property may be part of its business. Where the society is a cooperative Bank it cannot ordinarily be said to be engaged in business when it lets out properties owned by it. Therefore the dispute between a tenant and a member of the bank in a building which has subsequently been acquired by the Bank cannot be said to be a dispute touching the business of the Bank."

11. Lastly, Mr. Kavina has submitted that by moving such application, the respondents were trying to delay the proceedings of the suit and such an application is contrary to the directions given by this Court in a decision dated 14.2.2000 in Appeal From Order No. 658 of 1999, wherein this Court has observed that considering the facts and circumstances of the case, the trial court is directed to expedite the hearing of the suit and shall make an endeavour to see that it is completed preferably within a year from today." This order was passed in February 2000 and the hearing of the suit would have come to an end in any case in February 2001. However, the petitioner has moved the application on 19.2.2000 ignoring the aforesaid direction of this Court and in this view of the matter, this Court should not entertain the revision application filed by the petitioner.

12. I have given my anxious thoughts to the submissions made by the ld. advocates appearing for the respective parties. I have also gone through the facts found on record and the impugned order passed by the ld. trial Judge in the application below Exh. 98. I have also carefully considered the authorities relied upon by

the learned advocates appearing for the petitioner as well as for the respondents. Looking to the issue involved in the present revision application, more particularly considering the prayer made in the application below Exh. 98 on which the impugned order is passed by the ld. trial Judge, and the prayer made in the present Revision Application, I am of the view that the scope of present Civil Revision Application is very limited. Neither in the application Exhibit 98 before the trial court nor in the present Civil Revision Application a direct question is raised about the bar of the jurisdiction of the Civil Court in view of the provisions contained in Section 96(1) as well as under Sec. 166 of the Act. The only question which the Court was called upon to decide is as to whether the issue regarding jurisdiction of the court as framed by the trial court is to be decided as a preliminary issue or not. No prayer was made to the effect that since the dispute arose between the parties was an inter-se dispute between the members of the society and the said dispute can be resolved by the Board of Nominees and not by the Civil Court, the Civil Court has no jurisdiction to entertain, try and decide the suit. The trial court has, therefore, simply decided the application Exh. 98 only by holding that since there is mixed question of law and facts involved, the same can be decided only after recording evidence. The trial court has not come to a definite conclusion that the Civil Court has no jurisdiction to entertain, try or decide the suit. It is in this view of the matter in the present Civil Revision Application, what is to be seen is as to whether there is any jurisdictional error committed by the trial court while holding that the issue regarding jurisdiction of the court cannot be decided as a preliminary issue. Looking to the complexity of the issue which is a mixed question of law and facts, the authorities cited by both the parties are, therefore, relevant for the purpose of deciding the issue involved in the present Civil Revision Application. However, these authorities are very much relevant for the purpose of arriving at the conclusion whether the nature of dispute involved in the present proceedings is a dispute between the members of the Society, and as to whether it touches the constitution, management and business of the Society and as to whether the Civil Court's jurisdiction is barred by virtue of the provisions contained in Sec. 96(1) as well as Sec. 166 of the Act. I am, therefore, of the view that at this juncture it is not necessary to go into that controversy and as I confine myself to the prayer made in the Civil Revision Application, I am of the view that the learned Judge has not committed any jurisdictional error by

observing that the issue involved is a mixed question of law and facts and it has to be decided after taking evidence at the time of trial. This view is fortified by the decision of this Court in Jasuben Madhusudan Pandya vs. Manharlal Narandas Bhatt = 1990 (1) GLH 199 rendered while examining the provisions contained in Order 14 Rule 2 of the Civil Procedure Code. It is held in the said decision that it would not be correct to assume that any question touching upon a jurisdiction of a Court would automatically become an issue of law. As this question may as well depend on factual aspects, namely if no investigation is necessary and if it is not necessary to go into controversial facts, the question relating to jurisdiction may be treated and decided as an issue of law only under the amended provision. If on the other hand would it be necessary to decide a factual controversy before arriving at a conclusion with regard to the question of jurisdiction of the Court, such a question cannot be treated to be a pure question of law. Here, in the present case, whether the dispute regarding encroachment by one member of the society on the land of another member of the society can be considered as a dispute touching the constitution, management and business of the Society. This issue certainly requires the factual foundation and investigation of the facts with regard to inter-se rights of the members. In a given case, the society may or may not come into the picture. It requires investigation of the relevant facts, circumstances, documents, byelaws and rules and regulations of the Society. Whether the Society in any way is connected with such inter-se dispute of the members is also the relevant consideration for arriving at a conclusion as to whether it touches the constitution, management or business of the Society. Unless and until this exercise is undergone during the course of trial, it is not just and proper to render any decision as to whether the Civil Court has jurisdiction or not to entertain, try or decide the suit. Even otherwise, looking to the amendment made in Section 115 of the CPC, this Civil Revision Application is not maintainable against an interim order. Here in the present case, at the most, even if while allowing the Revision Application this Court directs the trial Court to decide the issue regarding jurisdiction as a preliminary issue, by that direction the suit would not be finally disposed of, as in that case the trial court will have to decide that issue as a preliminary issue and it will have to first come to the conclusion as to whether the Civil Court has the jurisdiction or not to decide the suit.

13. There is one more reason for this Court not to interfere in the order passed by the trial court, and that is to the effect that in earlier proceedings, this Court had directed the trial court to dispose of the suit preferably within the period of one year from the date of that order. That period expired much earlier and yet the suit was not disposed of. It is only because earlier an application was moved by the present petitioner to frame the issue regarding the jurisdiction of the court and once such an issue was framed by the trial court, subsequently another application was moved by the petitioner to decide the issue as a preliminary issue. In this process the time was consumed and the suit could not be decided despite the directions of this Court. In this view of the matter, this Court, while exercising its revisional jurisdiction under Sec. 115 of the CPC, does not think it proper to interfere in the order passed by the learned trial Judge and
Revision Application is rejected.

14. However, looking to the facts and circumstances of the case and in view of the discussions made hereinabove, I direct the trial court to decide all the issues including the issue regarding jurisdiction by considering the relevant provisions of law and the authorities on the subject as discussed above, and dispose of the suit as expeditiously as possible, and in any case on or before 31st March 2003.

15. With the above observations, this Civil Revision Application is disposed of. Rule is discharged. The interim relief stands vacated. No order as to costs.

rmr. [K.A. Puj, J.]